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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of *Ex Parte* Presentation
MB Docket No. 10-71

Dear Ms. Dortch:

On November 9, 2010, Shawn Bone, Susan Buck and Dorann Bunkin, all from Wiley Rein LLP, met with Michelle Carey, Deputy Bureau Chief, Media Bureau. In this meeting, the parties discussed many of the points about retransmission consent raised in the attached materials, which were left with Ms. Carey. Additionally, the parties addressed questions regarding the various factors that influence retransmission consent negotiations, and whether the FCC should look at reforming its *Good Faith Order*.

In accordance with Section 1.1206, one electronic copy of this letter is being filed in the above-referenced docket. Please direct any inquiries concerning this matter to the undersigned.

Respectfully submitted,

Dorann Bunkin

Dorann Bunkin

Cc (via E-mail): Michelle Carey

The History of Retransmission Consent

- *Pre-1992* – Cable companies are free to take whatever broadcast signals they want and place those on their cable system, under Supreme Court precedent. Local stations receive no compensation for cable retransmitting their signals to cable subscribers. Cable companies are free to pick and choose what broadcast stations receive carriage on their system, and are free to select signals from outside the local market.
- *1992* – Congress passes the Cable Television Consumer Protection and Competition Act of 1992 over the veto of then-President George Bush. The Act established a new means for broadcasters to negotiate carriage of their signal on a cable system, while reinforcing the need to maintain local broadcast market exclusivity[1]:
  - Must Carry & Retransmission Consent – For the first time, all local broadcast stations were granted a right to be carried on their local cable systems in order to ensure that all local consumers had access to key local programming. Broadcasters could exercise this right in two ways: (1) the broadcaster could elect **must carry status**, meaning that the broadcaster would automatically be carried on the local cable systems but would receive no compensation for such carriage; or (2) the broadcaster could negotiate the terms and conditions (including compensation) for carriage of its signal by the local cable company through a **retransmission consent agreement**.
  - Market Exclusivity – At the same time, Congress recognized the need for the FCC to enforce the sanctity of contract between a local broadcast station, its affiliated network, and any syndicators who sold their programming to the station, as well as protecting the carriage rights granted by the Act.[2] Under the market exclusivity rules (network nonduplication, syndicated exclusivity, and sports blackout), cable companies could not import television signals from out-of-market that duplicate programming distributed by an in-market station. Most affiliation and syndication contracts permit a local broadcaster to carry the contracted programming only in its local market. The certainty provided by such contracts also facilitates the purchase of advertising by businesses in the market, one of the only revenue streams for free over-the-air broadcasting.
  - Congress specifically contemplated that local broadcasters would be able to seek cash compensation for retransmission of their signals under the new retransmission consent system (just like other cable programmers seek cash compensation for carriage of their channels):
    - Senate Commerce Committee Report[3] on the Act (the Senate Commerce Committee was the body that first adopted the retransmission consent language in the Act): "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming service which originate on a broadcast channel should not be treated differently. It is true that broadcasters also benefit from being carried on cable systems, and many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to

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[1] This regulatory system was later extended to DBS satellite systems once they began to provide local-into-local service.

[2] The market exclusivity rules had been in effect prior to the Cable Act, but Congress indicated that those rules were integral to the retransmission consent system.

[3] See S. Rep. No. 102-92, at 34-38 (1992).

retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[4]

  - Statement by Senator Danforth on consideration of the bill:[5] "In some cases, broadcasters may receive compensation for allowing cable to retransmit their signals, just as other programmers receive compensation for their programming. . . . S. 12 creates a flexible scheme to govern the relationship between local broadcast stations and cable systems in differing markets with differing levels of strength."

  - Statement of Senator Inouye on consideration of the bill:[6] "[T]he bill is completely silent on what the negotiations between cable operators and broadcasters [for retransmission consent] may entail. Mr. President, they may negotiate for money or for non-monetary consideration . . . ."

- *1994 (and 1997)* – The Supreme Court upholds the constitutionality of the must carry system in the *Turner* line of cases (*Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997)[7]). The FCC issues rules establishing the framework for retransmission consent elections.

  - The rules largely permit open negotiations between the broadcaster and the MVPD system over the terms and conditions for retransmission of the broadcaster's signal. Broadcasters are under certain restrictions regarding their ability to permit carriage of their signal outside of their home market, and cable systems are under certain obligations concerning how it must carry a broadcast signal if an agreement is reached.[8] The actual negotiations, though, are unregulated, except that both parties are under a duty to negotiate a retransmission consent agreement "in good faith."[9] A party believing that its counterpart is not negotiating in good faith may file a complaint at the FCC alleging that fact and seeking redress.

  - During the initial retransmission consent election, broadcast stations and television networks seek cash compensation from cable companies for retransmission of broadcast signals. Cable companies uniformly refuse to pay cash compensation, instead seeking alternative compensation arrangements.[10]

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[4] *Id.* at 35-36.

[5] See 138 Cong. Rec. S413.

[6] See 138 Cong. Rec. S563.

[7] The Court is currently considering whether to grant a writ of certiorari to review another constitutional challenge to the must carry regime. See *Cablevision Broadcasting System v. FCC*, S.Ct. Docket No. 09-901 (cert. petition filed Jan. 27, 2010). Several companies have filed briefs with the Court asking that the writ be granted, including NCTA, Time Warner Cable, Discovery Communications, and C-SPAN. This case proposes a 5th Amendment challenge to the must carry system based on the Takings Clause, along with a request that the Court reconsider its *Turner* decision in light of changes to the MVPD and television marketplace.

[8] A cable system must place the broadcast channel on its basic tier, and must have the station's non-HD signal located on the same channel as the broadcaster uses for its over-the-air signal. Cable systems are also under a "buy through" requirement that forces every cable subscriber to purchase their local broadcast channels.

[9] 42 U.S.C. § 325(b)(3).

[10] It was not uncommon at this time for local network affiliates to assign their retransmission consent rights to their broadcast network. Networks often negotiated for carriage of additional cable-only television networks in lieu of cash compensation, and sometimes made cash payments to their local affiliates under separate arrangements in the network affiliation agreements. This system of alternative cash payments from networks to their affiliates has largely ceased over the last decade, and at the same time, local affiliates have taken back their retransmission consent negotiation rights.

- *1994 to Present* – In the years since retransmission consent was created, thousands of retransmission consent agreements have been reached between the almost 1,500 local broadcasters and cable and satellite systems throughout the country.
    - In the period of time since the Cable Act, cable systems began facing market competition from DBS satellite providers (DirecTV and Dish Network), as well as cable overbuilders (including telephone companies who began using fiber optic systems to deliver television to their subscribers). These new MVPD entrants were much more willing to pay local broadcasters cash compensation for their signal in order to make sure that their MVPD systems were competitive with the local cable providers. As the precedent for cash payment became stronger, broadcaster pressed cable providers for market parity, particularly given the continued "must watch" status of network programming.[11]
    - Cable, however, has maintained its refusal to pay for local broadcast channels. As a result, cable and local broadcast companies have become embroiled in a series of rancorous retransmission consent negotiations that caught the public's attention given the fear that consumers may lose access to their local stations.[12] Less than a dozen major retransmission consent disputes have occurred since its creation in 1992.

[11] Although it is true that broadcast television's ratings have steadily declined with the growth of cable-only programming, broadcast television still maintains significant viewership and individual broadcast programs continually appear at the top of the Nielsen ratings on a daily, weekly, monthly, and yearly basis.

[12] Local television programming, however, would remain available over the air and through alternative MVPD systems.

The Current Retransmission Consent Process is Fair to Consumers, Broadcasters, and Content Resellers

The Retransmission Consent Process Is Fair and Beneficial to Consumers

- The retransmission consent process tends to generate lots of headlines, but at the end of the day it works. Very few viewers are disenfranchised from watching their favorite programming, and even then the broadcaster's over-the-air signal always is available.
- Through a fair and balanced retransmission consent process, consumers benefit by continuing to have access to the quality network, syndicated, and local content they want and deserve.
  - Retransmission consent is essential to funding broadcast operations. That revenue supports the millions of dollars stations spend on local news, weather, sports, and public affairs programming.
  - Retransmission consent also supports broadcaster's infrastructure investments. For instance, that revenue is essential to help broadcasters purchase advanced weather radars for emergency weather alerts and fund more HD content.
- The underlying reality is that cable operators want to resell the highest-rated entertainment programming on television. Broadcasters want their programming viewed by as many people as possible. Both parties want consumers to have access to their content, and have every reason to reach an agreement.

The Retransmission Consent Process Is Fair to Broadcasters

- Broadcast stations regularly have far more viewers than any cable channel. Yet stations do not receive the same level of compensation as many lesser-viewed channels. Broadcasters simply want to reach an agreement with a content reseller (cable or DBS provider) that recognizes the true value of and demand for their content.
- Due to many years of little to no competition among video service providers, retransmission consent payments to local broadcasters either have been very low or nonexistent. The market for video services has reached a point now that content resellers should provide fair value or lose their right to retransmit local content to their competitors.
- Market exclusivity preserves the ability of local stations to receive fair value for their content. Without exclusivity as a necessary corollary to retransmission consent, content resellers could sell one stream of broadcast content nationally, undermining localism and diversity.

The Retransmission Consent Process Is Fair to Content Resellers

- The retransmission consent process provides a framework within which broadcasters and content resellers can reach a fair, negotiated value for retransmitting a station's signal. Both parties are under a statutory obligation to negotiate in good faith, reinforced by the FCC's own *Good Faith Order*.
- Stations and content resellers reach retransmission consent agreements all the time representing a fair market-based agreement on compensation for a station's content.
- Contrary to popular belief, Congress always envisioned a retransmission consent process where stations could seek cash compensation.
  - Content resellers habitually pay cash for other programming that they air at rates far above what is paid to local broadcast stations. In fact, vertically-integrated content resellers reach agreements with their own programming arms that often significantly overvalues their own content when compared to the ratings for broadcast stations. They then try to "balance the books" by paying less for broadcast signals.
  - During the period when content resellers used their market leverage to refuse to pay fair value for local signals, they were able to reinvest that money into sports programming and high-end content. In essence, broadcasters were forced to underwrite this growth by failing to get fair value. So in many ways, the current negotiations finally represent a fair playing field for both parties.
- Competition in the marketplace (spurred, among other things) by fair retransmission consent negotiations also has left consumers with multiple choices through which to receive video programming. If a content reseller has a habit of not paying fair value for local broadcast content, consumers can switch providers.

The Kerry Retransmission Consent Reform Draft Legislation Is Flawed and Does Not Fairly Evaluate the Current Retransmission Consent System

The current retransmission consent framework is working as intended Impasses are rare and withdrawal of signal is even more infrequent.

- Content resellers (cable and DBS providers who contract with broadcasters to retransmit their signal over their distribution platforms) and local broadcasters have negotiated thousands of retransmission consent agreements, with almost no disruption to consumers.
- Removal of programming is a last resort for broadcasters, and the broadcaster's over-the-air signal is always available to a consumer.

The draft Kerry legislation fails to recognize that market exclusivity is essential to the survival of broadcasters and local news, weather, sports, and public affairs programming.

- Market exclusivity is the cornerstone of preserving local programming. Broadcasters contract with networks, syndicators, and sports teams to access content consumers want, in turn gaining viewers and the necessary revenue to support local news, weather, and sports.
- Market exclusivity does not favor broadcasters in retransmission consent negotiations; rather it creates a level playing field so that broadcasters and content resellers stand on equal footing. Without exclusivity, content resellers would have no incentive to pay fair market value to local affiliates when it can buy one national signal.
- In 2005, the FCC concluded that retransmission consent creates a "level playing field" and that benefits broadcasters, content resellers, and most importantly consumers.

Cablevision and other vertically integrated MVPDs are living in a glass house when it comes to the price of content and removing content during carriage disputes.

- Content resellers negotiate carriage arrangements with other entities besides broadcasters, such as independent programmers, other vertically-integrated MVPDs, and even their own programming divisions. Many of those negotiations are just as contentious, and have resulted in the loss of programming for consumers.
- Many of these content deals with other content resellers or their own program arms often result in inflated rates for programming (compared to ratings). Resellers then try to undervalue broadcast signals to balance their books.

The draft Kerry bill assumes the FCC has the expertise to review complex carriage contracts and to evaluate their appropriateness in the broader carriage marketplace with only a last best offer from each party.

- Without a detailed knowledge of the television programming marketplace the FCC cannot determine if an offer is in good faith. Carriage contracts are extremely complex documents and include many more considerations than cash payments.
  - In creating retransmission consent, Congress expressed clear intent that the FCC not judge the reasonableness of an offer. Congress believed that judging an offer's reasonableness would be a regulatory intrusion into the marketplace. The FCC codified this approach in its *Good Faith Order*.
- The Kerry bill limits the FCC's opportunity and time to review the appropriateness of the offers on the table at the time of an impasse in a retransmission consent negotiation.
  - The Kerry bill presents the FCC only with the last offer from both the broadcaster and the content reseller, which represents only a snapshot in time that cannot capture the history of the negotiations or the context of the offers.
  - The FCC also does not have any information about what the reseller pays for its other content, so that it can judge the overall reasonableness of the offers compared to the reseller's other content.
- This truncated review, and the bill's assumption that the retransmission consent landscape is tilted toward broadcasters, creates a presumption on the part of the regulators that broadcaster offers asking for fair value are in bad faith and that arbitration is the only solution.
- Even in those situations where both parties negotiating in good faith, consumers are provided inadequate information about the dispute and asked to fairly evaluate the dispute. Specifically, they are not given comparative information about what the content resellers pays for other programming.